Supreme Court, U.S.
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No. 08-518

IN THE

Supreme Court of the United States

HASHMEL C. TURNER, JR.,

Petitioner,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA; THOMAS J. TOMZAK, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF FREDERICKSBURG, VIRGINIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

In an opinion authored by Justice Sandra Day O'Connor, sitting by designation, the Court of Appeals below applied settled precedent concerning legislative prayer to allow the City Council of Fredericksburg, Virginia ("City Council") to control its own government speech. Specifically, the Fourth Circuit held that the City Council acted permissibly when it determined that the official invocations with which it opened its meetings would remain nonsectarian, thereby complying with this Court's admonition that such prayers neither "proselytize or advance any one, or disparage any other, particular faith or belief." *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) (allowing legislative prayer). The Fourth Circuit recognized that as government speech, the City Council's opening prayers were not subject to the individual protections of the Free Speech and Free Exercise Clauses. And because the Council's policy governing invocations followed the rule of *Marsh*, it complied with the Establishment Clause.

Relying largely on case law having nothing to do with legislative prayer, Councilor Turner claims that the Fourth Circuit got it wrong. Indeed, Councilor Turner claims that this case involves "unique and important" questions of First Amendment law, that the result below is "unprecedented" and "has already triggered a discriminatory backlash," and that Justice O'Connor's opinion "threaten[s] to undermine free speech rights around the country." Petition for Writ of Certiorari ("Turner's Pet."), at 1, 2 (Oct. 20, 2008). In a supplemental petition, Councilor Turner claims further that a recent decision of the United States Court of

Appeals for the Eleventh Circuit has created a circuit split.

Councilor Turner is mistaken on all counts. There is no basis for his exaggerated language and no reason for this Court to grant his Petition.

First, the Fourth Circuit below applied settled law holding that legislative prayer such as that offered by the City Council is government speech. Far from being "unprecedented," *see* Turner's Pet., at 2, every case that has ever considered legislative prayer has reached this same conclusion. Indeed, as Justice O'Connor recognized in her opinion below, "[Councilor] Turner has not cited a single case in which a legislative prayer was treated as individual or private speech." (Appendix to Turner's Pet. ("Turner's App."), p. A-6).

Second, the Fourth Circuit below applied settled law holding that "when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995). The individual protections of the Free Speech and Free Exercise Clauses do not apply to the government's own speech. Accordingly, the City Council was entitled to determine that when it spoke through legislative prayers — a practice allowed by this Court in *Marsh* — it would refrain from potentially polarizing sectarian references.

Finally, the recent decision of the Eleventh Circuit in *Pelphrey v. Cobb County, Georgia*, __ F.3d __, 2008 WL 4710693 (11th Cir. Oct. 28, 2008), has not created a circuit split. Indeed, the Eleventh Circuit itself denied

that its decision was contrary to the Fourth Circuit's decision below, a denial that Councilor Turner conveniently omits from his Supplemental Brief. *See Pelphrey*, at *9 (noting that "Justice Sandra Day O'Connor, writing for the Fourth Circuit [in *Turner*], . . . *applied the same standard from Marsh that we apply today*") (emphasis added).

In conclusion, Councilor Turner's Petition is long on hyperbole and short on accurate legal analysis. This Court should deny Councilor Turner's Petition.

STATEMENT OF THE CASE

The City of Fredericksburg, Virginia, is governed by the City Council, which consists of seven elected members. (Turner's App., p. A-12). The City Council holds public meetings every two weeks to conduct its business. *Id.* The Mayor presides over these meetings. *Id.*

The City Council begins each of its meetings with a "Call to Order." *Id.* After the call to order, the Mayor recognizes a Council member to deliver the City Council's opening prayer. *Id.* The Council member delivering the prayer at any given meeting is selected from a list of Council members who have placed their name on the Council's prayer rotation. *Id.*

Members of the public are asked to stand for the opening prayer. *Id.* After standing, many "close their eyes and bow their heads" while the Council member recognized by the Mayor delivers the Council's prayer. *Id.* Following the opening prayer, everyone in the City Council chambers remains standing and recites the Pledge of Allegiance. *Id.*

This order of events is memorialized in the City Council's official printed meeting agendas. *Id.* These agendas include "Prayer" as an official agenda item, after the "Call to Order" and immediately before the "Pledge of Allegiance." *Id.*

A. *Councilor Turner Assumes a Seat on the City Council*

From their beginning in 1957 to 2002, there is no indication that the City Council's opening prayers had ever been sectarian. This changed when Councilor Turner assumed a seat on the City Council in 2002 and placed his name in the prayer rotation. *Id.* When it was Councilor Turner's turn to deliver the Council's opening prayer, he concluded it with phrases such as "in Jesus' holy name we pray," *see* Appendix, p. 4a, and "in the name of Jesus Christ, we thank you for what you are going to do." *Id.* at p. 5a. Indeed, on April 8, 2003, after being recognized by the Mayor to deliver the Council's opening prayer, Councilor Turner assumed the role of a government-sponsored minister, stating:

> Mayor, our City Council, before I go in prayer, *I would like to make a request to all that are here and those that are out there in TV land.* I believe that our land is in need of much prayer, and we would invite all of you that know the word of prayer, that know there is a God that created this universe . . . and answers prayers, we would ask that whether you are seated or whether you are standing tonight, that if you would go to God in prayer. . . .

> [W]e need to go to God in prayer. And I believe that He would hear and answer each and every one of our prayers.

Id. at p. 1a (emphasis added). Following this prologue, Councilor Turner delivered a prayer that concluded with: "Forgive us all for our sins, lead, guide and direct us is our prayer in Jesus' name." *Id.* at p. 2a (emphasis added). Several months later, upon his next opportunity to deliver the City Council's opening prayer, Councilor Turner prayed: "Must Jesus bear the cross alone and all the world go free. No there's a cross for everyone and, surely, there's a cross for me. . . . Lord, we ask these blessings in Jesus' name." *Id.* at pp. 7a-8a.

Following objections by the ACLU to Councilor Turner's prayers, in November 2005, the City Council adopted a policy regulating its own speech. Specifically, the policy required the City Council to "continue its current practice of offering the official [opening] prayer to a non-denominational 'God,' without invoking the name of a specifically Christian (or other denominational) deity." Turner's App., p. A-13. Councilor Turner abstained from the vote on this policy. *Id.*

Following the adoption of this policy, the Mayor asked Councilor Turner if he "would continue to invoke the name of Jesus Christ" when he delivered the Council's opening prayers. *Id.* at p. A-14. Councilor Turner insisted that he would. *Id.* As a result, at the City Council meeting on November 22, 2005, the Mayor did not recognize Councilor Turner to give the Council's opening prayer, as Councilor Turner had been scheduled to do. *Id.*

B. *Councilor Turner Sues the City Council and the Mayor*

On January 10, 2006, Councilor Turner filed this suit against the City Council and the Mayor of the City of Fredericksburg, Dr. Thomas J. Tomzak. Councilor Turner claimed that the City Council's prayer policy violated his alleged right to deliver official City Council prayers in the name of Jesus Christ. Councilor Turner asserted claims under the First, Fifth and Fourteenth Amendments to the United States Constitution, various provisions of the Virginia Constitution, and various federal and state statutes.

On cross-motions for summary judgment, the district court granted defendants' motion and dismissed Councilor Turner's Complaint. (Turner's App., pp. A-11 - A-23). The district court held that the official opening prayers of the City Council were government speech. (Turner's App., pp. A-15 - A-17). Because the prayers were government speech, the "First Amendment guarantees with respect to free expression and exercise of religion" — guarantees that apply only to private speech — "[we]re not implicated." (Turner's App., p. A-16). Rather, the district court recognized, the City Council's speech was "subject only to the proscriptions of the Establishment Clause," *see* Turner's App., p. A.18, proscriptions that the policy satisfied.

On appeal, in an opinion by Justice Sandra Day O'Connor, the Fourth Circuit affirmed the decision of the district court. *Turner v. City Council of the City of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008), *included in* Turner's App., pp. A-1 - A-10. The Fourth

Circuit held that "[b]ecause the prayers at issue here are government speech, . . . Fredericksburg's prayer policy does not violate Turner's Free Speech and Free Exercise rights." (Turner's App., p. A-3).

In reaching this conclusion, the Fourth Circuit first considered whether the City Council's opening prayers were "speech that must be attributed to the government, or whether the . . . prayers were given in a personal capacity." (Turner's App., p. A-4). The court noted that Councilor Turner "ha[d] not cited a single case in which a legislative prayer was treated as individual or private speech." (Turner's App., p. A-6). The court noted further that the facts of this case — in which the opening prayers were "an official part of every Council meeting," the prayer-givers were "allowed to speak only by virtue of [their] role as a Council member," and the prayers were "clearly serving a government purpose" — compelled the conclusion that the prayers were government speech. (Turner's App., pp. A-5 - A-6).

The Fourth Circuit then considered whether the City Council's prayer policy violated Councilor Turner's Free Speech and Free Exercise rights. As Justice O'Connor noted, "[t]his issue turns on the characterization of the invocation as government speech." Turner's App., at p. A-9 (quoting *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005)). When the government is "the speaker," it may "regulate the content of what is or is not expressed." Turner's App., at p. A-10 (quoting *Rosenberger v. Rectors and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995)). Because the City Council's prayers were government speech, Councilor Turner's "First Amendment and Free

Exercise rights ha[d] not been violated." Turner's App., at A-10.

Finally, the Fourth Circuit considered whether the City Council's prayer policy itself violated the Establishment Clause. Relying on this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Fourth Circuit held that it did not. Rather, "[t]he Council's decision to provide only nonsectarian legislative prayers place[d] it squarely within the range of conduct permitted by *Marsh*." Turner's App., at p. A-9.

Justice O'Connor noted expressly that the Fourth Circuit was *not* deciding whether a nonsectarian prayer policy was *required* by the Establishment Clause; that is, it was not deciding whether Councilor Turner's prayers in the name of Jesus Christ were constitutionally permissible absent any Council policy. Rather, the court held only that the City Council's nonsectarian prayer policy was an acceptable regulation of the Council's own speech. *See* Turner's App., p. A-8 ("We need not decide whether the Establishment Clause *compelled* the Council to adopt their [nonsectarian] legislative prayer policy . . . .").[1]

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[1] Defendants note that there is no support in the record, and Councilor Turner cites none, for Councilor Turner's claims that the decision below "has already triggered a discriminatory backlash against state-trooper chaplains in Virginia." Turner's Pet., at 1.

REASONS FOR DENYING THE PETITION

This Court should deny Councilor Turner's Petition. This case presents no "unique and important questions," *see* Turner's Pet., at 11, and most certainly does not "threaten[] to sweep an entire category of individual free speech rights out of the constitution." *Id.* at 12. Rather, the Fourth Circuit below applied settled precedent in holding that the City Council, a government body, could regulate its own speech. No court has held otherwise. Accordingly, there is no circuit split on this issue and no other factors weighing in favor of this Court's intervention. *Cf.* Sup. Ct. R. 10 ("A petition for writ of certiorari will be granted only for compelling reasons.").

I. *The Fourth Circuit Properly Applied this Court's Precedents and Held that the City Council, a Government Body, Could Regulate Its Own Speech*

A. *The Fourth Circuit Held Correctly that the City Council's Official Opening Prayers Are Government Speech*

The Fourth Circuit held correctly that the City Council's official opening prayers are government speech. Notwithstanding Councilor Turner's efforts to confuse this issue, *see* Turner's Pet., at 12, 14-17, this is not a novel or open question. Every court that has ever considered legislative prayer, including this Court, has treated such prayer as "government speech, 'subject only to the proscriptions of the Establishment Clause.'" *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005) (Wilkinson, J.), *cert. denied*

546 U.S. 937 (2005). Justice O'Connor recognized this below, noting that "[Councilor] Turner ha[d] not cited a single case in which a legislative prayer was treated as individual or private speech." (Turner's App., p. A-6).

In light of this monolithic authority, Councilor Turner's claim that the Fourth Circuit's decision on this point was "unprecedented," *see* Turner's App., at A-2, is preposterous.

This Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), is instructive. The plaintiff in *Marsh* challenged the opening prayers of the Nebraska state legislature. This Court did not analyze the constitutionality of those prayers under the Free Speech and Free Exercise Clauses, as it would have done if the speech in question had been private. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (noting that "private speech endorsing religion [is protected by] the Free Speech and Free Exercise Clauses") (quoting *Bd. of Educ. of Westside County Sch. v. Mergens*, 496 U.S. 226, 250 (1990)). Rather, this Court defined the issue as whether the challenged legislative prayers "violate[d] the [E]stablishment [C]lause," *Marsh*, 463 U.S. at 784, a clause that applies only to speech by (or endorsed by) the government. *See Santa Fe*, 530 U.S. at 302 (the "Establishment Clause forbids . . . *government* speech endorsing religion") (quoting *Mergens*, 496 U.S. at 250).

No case has ever deviated from the approach of *Marsh* and applied a free speech or free exercise analysis to legislative prayer. *See, e.g., Pelphrey v. Cobb County*, __ F.3d __, 2008 WL 4710693 (11th Cir. Oct. 28, 2008) (applying Establishment Clause to opening

prayers of county commissions); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (applying Establishment Clause to opening prayers of Indiana state legislature); *Simpson*, 404 F.3d at 288 (opening prayers of a local government body are "government speech, 'subject only to the proscriptions of the Establishment Clause'") (quoting *Rosenberger*, 515 U.S. at 820); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (applying Establishment Clause to opening prayers of town council), *cert. denied*, 545 U.S. 1152 (2005); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (applying Establishment Clause to opening prayers of city council); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 Fed. Appx. 355 (9th Cir. 2002) (in unpublished decision, applying Establishment Clause to opening prayers of school board); *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867 (Cal. Ct. App. 2002) (applying Establishment Clause to opening prayers of city council).

To hold that this case involves anything other than government speech would strain credulity. The City Council's opening prayers are exactly that — the *City Council's* opening prayers. They are offered on the City Council's behalf by an elected councilor after the Mayor calls the meeting to order and recognizes that elected official to deliver the City Council's prayer. *See supra*, at 3. Members of the public are asked to and do stand for the prayer, which is followed immediately by the Pledge of Allegiance. *See supra*, at 3. Only by turning a blind eye to these facts could one characterize these officially sanctioned prayers, delivered only by government officials in their capacity as such, as private speech entitled to protection under the Free Speech and Free Exercise Clauses.

Councilor Turner attempts to support his "private speech" argument by claiming that this Court's "government speech doctrine" has had a "relatively short lifespan," *see* Turner's Pet., at 14, and is thus evolving and open for debate. This argument is disingenuous. The "doctrine" to which Councilor Turner refers has nothing to do with legislative prayer, which occupies a unique niche in Establishment Clause jurisprudence. *See Simpson*, 404 F.3d at 281 (the decision in *Marsh* "has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines"); *Snyder*, 159 F.3d at 1232 ("the mainline body of Establishment Clause case law provides little guidance for our decision in this case [involving legislative prayer]. Our decision, instead, depends on our interpretation of the holding in *Marsh*."). Indeed, the "doctrine" Councilor Turner cites has nothing to do with the Establishment Clause at all. Rather, it is essentially the federal government's defense to claims that it is using public money to compel speech in violation of the First Amendment. *See, e.g.*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (advertising funded by targeted government assessment on beef producers was government speech, and thus not subject to a First Amendment challenge as a compelled subsidy).

In sum, the Fourth Circuit's conclusion that the City Council's opening prayers are government speech is supported both by common sense and by the unanimous case law addressing legislative prayer, including this Court's decision in *Marsh*.

B. *The Fourth Circuit Held Correctly that Because the City Council's Official Opening Prayers Are Government Speech, Councilor Turner's Free Speech and Free Exercise Challenges Fail*

Councilor Turner conceded in the district court that if the City Council's opening prayers are government speech, his challenges under the Free Speech and Free Exercise Clauses fail. *See* Turner's Consol. Mem. in Support of Plaintiff's Mot. for Summary Judgment and in Opp. to Defendants' Mot. for Summary Judgment, at 15 (June 23, 2006) (conceding that "an individual free speech analysis is inapposite in the government speech arena"). Although he now argues a different view, *see* Turner's Pet., at 20-21, Councilor Turner's initial concession was correct. As this Court has recognized, "when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995); *see also, e.g.*, *Simpson*, 404 F.3d at 288 ("government speech [is] subject only to the proscriptions of the Establishment Clause") (citing *Rosenberger*).

As the City Council's opening prayers are government speech, Councilor Turner's claim that the City Council infringed upon his rights of free speech and free exercise in a manner that cannot withstand "strict scrutiny," *see* Turner's Pet., at 18-21, is misplaced. There are no such rights with respect to government speech. *See, e.g.*, *Simpson*, 404 F.3d at 287-88 (rejecting plaintiff's claim that county board's refusal to allow her to deliver its opening prayer violated her First Amendment rights). Put simply, "[n]o individual has a

First Amendment right to offer an *official* prayer reflecting his *personal* religious beliefs." *Hinrichs v. Bosma*, 410 F. Supp. 2d 745, 750 (S.D. Ind. 2006).

Councilor Turner's repeated references to a "forum" analysis fail for similar reasons. By invoking the term "forum," Councilor Turner refers to this Court's distinction in cases under the Free Speech Clause between the various venues in which private speech can occur. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (referring to "the traditional public forum, the public forum created by government designation, and the nonpublic forum") (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). A "forum" analysis, however, has nothing to do with legislative prayer, which is government speech. Rather, this Court "adopted a forum analysis as a means of determining when the [g]overnment's interest in limiting the use of its property . . . outweighs the interest of those" — i.e., those *outside* of the government — "wishing to use the property for other purposes." *Cornelius*, 473 U.S. at 800; *see also Goulart v. Meadows*, 345 F.3d 239, 248 (4th Cir. 2003) ("The Supreme Court has adopted forum analysis as the means of analyzing restrictions placed on *private speech that occurs on government property*.") (emphasis added). This explains why no case involving legislative prayer engages in the "forum" analysis that falsely anchors Councilor Turner's petition.

Nor can Councilor Turner rely on the "vagueness" and "overbreadth" doctrines. *See* Turner's Pet., at 24-28. Those doctrines apply to protect only the *private* "exercise of First Amendment rights." *City of Chicago*

v. Morales, 527 U.S. 41, 52 (1999); *see also Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (airport regulation was overbroad because it "prohibit[ed] . . . protected expression" under the First Amendment).

In sum, as Justice O'Connor recognized below, "because the prayers at issue here are government speech, . . . Fredericksburg's prayer policy does not violate [Councilor] Turner's Free Speech and Free Exercise rights." (Turner's App., p. A-3).

C. *Whether the Establishment Clause Requires Nonsectarian Legislative Prayer Is Not at Issue in this Case*

Councilor Turner asks this Court to grant certiorari and "acknowledge that the Establishment Clause does not require that legislative prayer extinguish the diversity of religious viewpoints in our country." Turner's Pet., at 30. But the decision below held no such thing. Although the City Council argued below — and still believes — that the Establishment Clause forbids sectarian legislative prayer, the Fourth Circuit did not address that issue. *See* Turner's App., at p. A-8 ("[w]e need not decide whether the Establishment Clause *compelled* the Council to adopt their legislative prayer policy" prohibiting sectarian references).

Rather, the Fourth Circuit below held simply that the Council, as a government body regulating its own speech, was *permitted* to adopt such a policy. *See* Turner's App., at A-9 ("The Council's decision to provide only nonsectarian legislative prayers places it

squarely within the range of conduct permitted by *Marsh* . . . ."); *see also Pelphrey*, 2008 WL 4710693, at *9 ("the Fourth Circuit [in *Turner*] expressly declined to hold that *Marsh* required a policy of nondenominational prayers") (citing *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008)). This holding makes sense. The City Council surely may determine how it will effectuate *Marsh's* admonition that legislative prayer may not "proselytize or advance any one, or disparage any other, particular faith or belief." *Marsh*, 463 U.S. at 794-95.

Councilor Turner, however, believes that the City Council lacked the authority to regulate its own speech and to determine how it would comply with the mandate of *Marsh*. He claims that the City Council's prayer policy violates the Establishment Clause because it attempts to "prescribe or proscribe the content of official prayers." Pet., at 21-24. Councilor Turner cites *Lee v. Weisman*, 505 U.S. 577 (1992), a case having nothing to do with legislative prayer, as the sole support for this argument. *See* Pet., at 21-24.

Councilor Turner, however, misunderstands the scope of *Lee*. The student-plaintiff in *Lee* argued that a school-sponsored prayer at a middle school graduation violated the Establishment Clause. *See Lee*, 505 U.S. at 580. In response to this argument — and in an effort to minimize any perceived violation of the Establishment Clause — the defendant school district noted that it had asked the invited clergy to deliver prayers that were strictly nonsectarian. *Id.* at 588-89.

This Court rejected the school district's argument. It held that school-sponsored prayers at a public school graduation were impermissible, whether sectarian or not. *Id.* at 588-90. In short, the decision in *Lee* applied to the school prayer context, in which *no* government-sponsored prayers are permissible.

In sharp contrast, this case involves the one context in which this Court has held that the Constitution *does* permit the government to sponsor prayer; namely, the context of a legislative invocation, as long as the government ensures that the invocation is not "exploited to proselytize or advance any one, or disparage any other, faith or belief." *See Marsh*, 463 U.S. at 794-95; *see also Lee*, 505 U.S. at 596-97 (refusing to apply the rule of *Marsh* to school prayer because of "[i]nherent differences between the public school system and a session of a state legislature"); *Simpson*, 404 F.3d at 281 ("*Marsh*, in short, has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines."). Given this Court's special treatment of legislative prayer, a legislative body has not only the right, but the *obligation* to regulate — or "prescribe" — the content of its official prayers. *Marsh* recognized this obligation when it held that there are limits on the allowable scope of legislative prayer. *Marsh*, 463 U.S. at 794; *see also Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998) ("[w]hen a legislative body prevents its agents from reciting a prayer that falls outside this genre [of acceptable legislative invocations], the legislators are merely enforcing the principle[s] [adopted] in *Marsh*").

In conclusion, because the City Council's choice to offer nonsectarian legislative prayers does not violate the Establishment Clause, that choice is necessarily permissible. *See Simpson*, 404 F.3d at 288 (government speech is "subject only to the . . . Establishment Clause").

II. *There Is No Circuit Split*

As discussed above, the decision of the Fourth Circuit below accords with settled law concerning the government's ability to regulate its own speech in the legislative prayer context. Nonetheless, Councilor Turner claims in his Supplemental Brief ("Turner's Supp. Pet.") that there is in fact a "circuit split" on this issue. Turner's Supp. Pet., at 1. As support for this claim, he cites the recent decision of the United States Court of Appeals for the Eleventh Circuit in *Pelphrey v. Cobb County, Georgia*, __ F.3d __, 2008 WL 4710693 (11th Cir. Oct. 28, 2008), which he claims is directly contrary to the holding of the Fourth Circuit in *Turner*.

Once again, however, Councilor Turner is mistaken. As evidence, one needs only to consider the words of the *Pelphrey* court itself, which considered Justice O'Connor's opinion in *Turner* and found it to be perfectly consistent with its own analysis:

> This year, Justice Sandra Day O'Connor, writing for the Fourth Circuit, read *Marsh* to allow invocations offered during meetings of a city council. *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352, 356 (4th Cir. 2008). The city council permitted only nondenominational prayers at its meetings,

> and Turner, a member of the council who had not been allowed to offer a sectarian prayer, challenged that policy. *Id.* at 354. The Fourth Circuit upheld the policy *and applied the same standard from Marsh that we apply today*: "So long as the prayer is not used to advance a particular religion or to disparage another faith or belief, courts ought not to 'parse the content of a particular prayer.'" *Id.* at 356 (quoting *Marsh*, 463 U.S. at 795). . . .
>
> Although it upheld the policy of the council, the Fourth Circuit expressly declined to hold that *Marsh* required a policy of nondenominational prayers . . . As the Fourth Circuit recognized, *Marsh* permits a range of prayers to be offered during local, state, or federal legislative meetings.

Pelphrey, at *9.

Moreover, the decisions in *Pelphrey* and *Turner* involved different issues. Specifically, the plaintiffs in *Pelphrey* sued to stop legislative prayers that they deemed impermissibly sectarian. Faced with this claim, the Eleventh Circuit was forced to determine what sorts of legislative prayers impermissibly "proselytize or advance" religion, *Marsh*, 463 U.S. at 794, thereby violating the Establishment Clause. *See Pelphrey*, at *1 ("The taxpayers argue that the Establishment Clause permits only nonsectarian prayers for the meetings of the commissions, but we disagree.").

In contrast, this case is about the ability of a city council to control its own speech. The issue is not what the Establishment Clause requires with respect to the content of legislative prayer, as nobody has sued claiming that the Council's prayers impermissibly advanced religion. Rather, the issue is whether a city council can choose to deliver only prayers that are nonsectarian. As Justice O'Connor noted expressly below, the Fourth Circuit did not need to, and was not, deciding what the Establishment Clause required in terms of the content of a legislative prayer. *See* Turner's App., at p. A-8 ("We need not decide whether the Establishment Clause *compelled* the Council to adopt their legislative prayer policy, because the Establishment Clause does not absolutely dictate the form of legislative prayer.").

In sum, Councilor Turner's "circuit split," *see* Turner's Supp. Pet., at 1, is imaginary.

CONCLUSION

Contrary to Councilor Turner's hyperbole, nothing in the decision below is inconsistent with any decision of this Court or any other court of appeals. For this reason, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Date: November 20, 2008

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTED TRANSCRIPT OF PROCEEDINGS

[commencing at page 25]

April 8, 2002

MAYOR BECK: Thank you all for being here. We will start the April 8, 2003, meeting of the Fredericksburg City Council. I will call that to order. And we will start with a prayer led by Reverend Hashmel Turner, followed by the Pledge of Allegiance.

HASHMEL C. TURNER, JR.: Mayor, our City Council, before I go in prayer, I would like to make a request to all that are here and those that are out there in TV land. I believe that our land is in need of much prayer, and we would invite all of you that know the word of prayer, that know that there is a God that created this universe that we live in that sets high and looks low and hears and answers prayers, we would ask that whether you are seated or whether you are standing tonight, that if you would go to God in prayer, because there is war and rumors of war in our land and a lot of violence, a lot of hatred and a lot of malice and a lot of evil that's in the land and we need to go to God in prayer. And I believe that he would hear and answer each and every one [26] of our prayers.

All wise and all merciful God, our Dear Heavenly Father. Father God, we come right now to thank you first of all for your grace, we thank you for your mercy, we thank you for the love that you continue to shower down upon each and every one of us. We have gathered

here in this chamber tonight to address the business and the concerns of this great city that we live in, but we ask, Lord, that you would look upon us and that you would bless us individually and collectively, that each and every household is represented and that's out there in TV land, whatever needs there are that they have, we ask that you would meet those needs right now. We pray for healing upon the sick and afflicted in the land, for bereaved families as our minds focus on the Garnett family, as they have buried a loved one today. We pray that you would continue to be with them and lift them up. And not only them, but others in the community. Families that are enduring a time of bereavement and sorrow, that you would be with them and give them the strength [27] that they need. As our nation is in war and there is rumors of other conflicts flaring up, but you know all about that because in your word you said that there would be a time when there would be wars and rumors of wars, and we are living in perilous times, which are known as very dangerous times because if we turn on our TV sets or we pick up the paper, turn on the radio, we hear so much that is going on. But I realize that you are still in charge, so we ask that you would address those concerns and those needs that we have. Forgive us all for our sins, lead, guide and direct us is our prayer in Jesus' name. Amen.

Appendix

May 13, 2003

MAYOR BECK: Thank you very much. I would like to call the May 13, 2003, meeting of the Fredericksburg City Council to order. Thank you. We will start with a prayer led by councilman Matt Kelly, followed by the Pledge of Allegiance.

MATTHEW J. KELLY: Most merciful Father, be with us here tonight to comfort those in need,

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encourage us to share the blessings we receive with those less fortunate than ourselves. All of this we ask with praise and thanksgiving for this opportunity to serve. Amen.

August 13, 2002

HASHMEL C. TURNER, JR.: All wise and all merciful God, Our Dear Heavenly Father, we gather Lord God in this hour of the evening and we realize, Father, that you are in our presence. We thank you for your grace, thank you for your mercy. Lord we just thank you for all the love that you continue to shower down upon us. As we are about the business of this locality, we ask Lord God, that you will cleanse our hearts and our minds that we make the right decisions that's best suited for this locality and we ask that you would

bless our leaders from the state wide offices and for the national offices and the world wide leaders. We are in some turbulent times. There is war and rumors of war is going on around us. We are much concerned, Lord God, and we realize that it's all in your care. We ask that you would [10] be with us through this session, that we would do those things that are pleasing in your sight. Thank you for what you have done in our lives. Lord, we thank you for what you are going to do in Jesus' holy name we pray. Amen.

August 27, 2002

MAYOR BECK: Good evening, I would like to call the August 27, 2002, meeting of the Fredericksburg City Council to order. We will start with a prayer led by Councilman Thomas Fortune followed by the Pledge of Allegiance.

THOMAS FORTUNE: We ask God to give this counsel the energy to look at all sides of the issues that come before it. We ask that we be given the integrity to decide matters on the basis of what's best for all the people of the city and not on the basis of what might be good for us personally. And we ask for the patience to listen to public criticism with humility when we are in the wrong, and with forbearance when that criticism is petty, foolish or mean spirited. Amen.

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city's business tonight, help us make decisions that benefit all the residents of Fredericksburg, in your name we pray. Amen.

July 22, 2000

HASHMEL C. TURNER, JR.: —we are concerned about those that are less fortunate, we pray that you will continue to bless families that are going through a period of bereavement. Please be with them right now and give them guidance and help them through their time of sorrow. We are concerned about our men and our women around the world that are serving in our Armed Forces. We ask that you will continue to bless and protect them, keep them ever before you, and we ask, Lord God, that you would help us to always be mindful that we are about doing those things that are pleasing in your sight. Continue to give us guidance and direction as we address the concerns of this city tonight, for we thank you for what you have done. Lord, we thank you for what you are doing right now. And in the name of Jesus Christ, we thank you for what you are going to do. [34] Amen.

August 12, 2003

MAYOR BECK: Thank you, I would like to call the August 12, 2003, meeting of the Fredericksburg City Council to order. We will start with a prayer led by Vice Mayor Scott Howson, followed by the Pledge of Allegiance.

W. SCOTT HOWSON, III: Heavenly Father, we thank you for this opportunity to serve. And humbly ask your blessing on those gathered here tonight. Guide us through inevitable conflicts. Help us to keep our minds on the job before us. Instill in us the confidence to pursue the best solutions, and the wisdom to know when we have reached that point. Keep our eyes and ears ever focused on the needs of the individuals and families who very selected us for this task, and who trust us with this responsibility. And as we work together, we are thankful for the strength, dedication and knowledge of the men and women who comprise the city staff, without who's efforts our work would mean nothing.

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especially those still suffering from the effects of Hurricane Isabel. As always, we also ask that you be with our men and women in uniform, both in the Armed Forces, as well as law enforcement and emergency services. Their sacrifices and those of their families insure the safety and freedom that we enjoy. Let us not forget that we are here to serve and not be served. And as we conduct the city's business tonight, help us make decisions that benefit all the residents of Fredericksburg. In your name we pray. Amen.

October 14, 2003

MAYOR BECK: Thank you all for being here. I would like to call the October 14, 2003, meeting of the Fredericksburg City Council to order. We will start with a prayer led by councilman Hashmel Turner, followed by the Pledge of Allegiance.

HASHMEL C. TURNER, JR.: Heads bowed, eyes closed. The hymnologist one day picked up a pen and he put these words to penmanship. "Must Jesus bear the cross alone and all the world go [39] free. No, there is a cross for everyone, surely there is one for me."

All wise and all merciful God, out there, Heavenly Father, we come at this hour today to say thank you for grace, thank you for mercy. Lord we thank you for all the love that you continue to shower down upon each and every one of us. Lord we are concerned about the things of the city, and we are here this evening to address the business of this dear city. We are concerned, Lord God, about our families. We pray your blessings upon them, family members far and near. We ask your blessings upon them from the oldest to the youngest. We realize, Lord God, that our nation is going through some terrible times. We turn on the TV, we turn on the radio, we pick up the newspaper, we hear war and rumors of war. We ask, Lord God, that you would bless our service personnel world wide as they defend the freedom that we cherish so dearly. We are just so thankful now for another opportunity to stand before you and to acknowledge that you are the God, the

creator of heaven and earth. We pray [40] Lord God, that you would just look at our hearts and our minds, search them. If you find anything there that shouldn't be, we pray Lord God, that you would remove it. We pray Lord God, that you would continue to instill in our leaders, starting with the local, the state, the national, and the world wide leaders, that they may seek peace, that they have an understanding heart to be concerned about the creation, your prized creation, mankind. Lord, we ask these blessings in Jesus' name. Amen.

October 28, 2003

MAYOR BECK: Thank you very much. I would like to call the October 28, 2003, meeting of the Fredericksburg City Council to order. We will start with a prayer led by councilman Vice Mayor Scott Howson, followed by the Pledge of Allegiance.

W. SCOTT HOWSON, III: Heavenly Father, we come here tonight thankful for the privilege of serving our citizens of the city. Grant us patience and wisdom as we work together to find

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